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No. 97-348

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL G. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause barred petitioner's criminal prosecution and punishment on charges of bank fraud and misapplication of bank funds because he had previously agreed to make $1.8 million in restitution to the Office of Thrift Supervision based on the same conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-21A) is unpublished, but the decision is noted at 113 F.3d 1230 (Table). A prior opinion of the court of appeals (Pet. App. 47A-69A) is reported at 51 F.3d 1105. The opinion of the district court denying petitioner's pretrial motion to dismiss on double jeopardy grounds (Pet. App. 27A-46A) is reported at 845 F. Supp. 934.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1997. A petition for rehearing was denied on July 17, 1997. The petition for a writ of certiorari was

filed on August 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on two counts of bank fraud, in violation of 18 U.S.C. 1344, and four counts of misapplication of bank funds, in violation of 18 U.S.C. 657. He was sentenced to 33 months' imprisonment, to be followed by three years' supervised release, and ordered to pay a fine of $6,000. The court of appeals affirmed. Pet. App. 2A-21A.

1. In 1984, petitioner founded Charter Federal Savings and Loan Association in Stamford, Connecticut, and became its president and chief executive officer. A short time later, he set up Bedford Equities Corporation, a wholly owned subsidiary of Charter Federal, to engage in real estate transactions on behalf of the savings and loan. When Charter Federal began operations, petitioner asked its board of directors for permission to receive commissions for locating real estate for Charter Federal to purchase. The board denied petitioner that authority because it believed that allowing petitioner to receive commissions would create a conflict of interest. Pet. App. 4A, 50A-51A; Gov't C.A. Br. 7.

Later the same year, petitioner urged Charter Federal's board of directors to approve Bedford's purchase of property at 1200 Summer Street in Stamford for $3.65 million. Petitioner told the board that the real estate commission on the sale would be split between the listing agent and Samual Boyarsky, a real estate broker. In fact, Boyarsky agreed to act as a straw man for petitioner and secretly returned

$67,500 of his $75,000 commission to petitioner. Pet. App. 7A.

In 1986, Bedford sought to sell commercial property at 30 Buxton Farms Road. William Malloy, a member of Charter Federal's board, suggested two potential purchasers for the property, and petitioner and Malloy agreed that Malloy would receive a $200,000 commission from the sale when one of these individuals purchased the property. Because Malloy was a member of the board, however, petitioner and Malloy listed Brian Egan as the broker for the deal. Because of a shortfall of capital, Charter Federal was not able to pay the commission immediately, and so petitioner arranged for Egan to obtain a $100,000 loan from Charter Federal, the proceeds of which Egan gave to Malloy. A year later, to obtain the remainder of the commission, Malloy submitted two false invoices in Egan's name, which petitioner then approved for payment. Pet. App. 8A-9A.

In mid-1987, petitioner sought to sell another Bedford property at 159 Franklin Street to Burt Hoffman, a developer. Although interested in the purchase, Hoffman lacked the capital to buy the property. Petitioner therefore arranged for Hoffman to obtain a "development loan" so that Hoffman could use the proceeds of that loan to make the down payment on the Franklin Street property. That arrangement was used to allow Charter Federal to report a profit on the sale. Pet. App. 10A-11A.

2. In 1990, Charter Federal became insolvent and was seized by the Resolution Trust Corporation. A short time later, the Office of Thrift Supervision (OTS) began an investigation of the savings and loan. In 1993, OTS filed a formal notice of charges against petitioner. Petitioner entered into a consent order

with OTS settling the formal charges. Pet. App. 85A-95A. In the consent order, under the heading "Restitution," petitioner agreed to pay OTS $300,000 "to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law" alleged in the notice. In the same portion of the consent order, petitioner also agreed "to pay the further sum of $1,500,000" as a "personal obligation." *Id.* at 88A. Both of these payments were intended "to reimburse Charter Federal Savings and Loan Association, Stamford, Connecticut against loss." *Ibid.*

3. On September 22, 1993, the government obtained an indictment charging petitioner with bank fraud and misapplication of bank funds based on the same conduct that formed the basis for the OTS charges. Pet. App. 33A. Relying on *United States* v. *Halper*, 490 U.S. 435 (1989), petitioner moved to dismiss the indictment, alleging that the $1.8 million settlement with OTS constituted punishment for the offenses charged in the indictment, and therefore that the multiple punishments prong of the Double Jeopardy Clause barred his prosecution on the indictment. The district court denied the motion to dismiss. Pet. App. 27A-46A. The court found that "restitution and an agreement not to participate in the affairs of any financial institutions were the only goals of the OTS proceeding," *id.* at 37A, and that "the Consent Judgment of $1,800,000 constituted a compromise concerning the amount of the Charter loss attributed to [petitioner's] actions," *id.* at 38A. Accordingly, the court concluded, "the OTS settlement was for remedial, not punitive purposes," because it sought to recompense the government for the $2.2 million in losses to Charter Federal. *Ibid.*

4. Petitioner took an interlocutory appeal, and the court of appeals affirmed. Pet. App. 47A-69A. The court of appeals agreed with the district court that petitioner's agreement to pay $1.8 million to OTS served the remedial purpose of recompensing OTS for the losses petitioner caused to Charter Federal. *Id.* at 68A. The court thus found that petitioner had "failed to make a threshold showing that any of the terms of the civil settlement could be construed as punishment. Consequently, double jeopardy protection does not attach." *Id.* at 69A. This Court denied review. *Morgan* v. *United States*, 116 S. Ct. 171 (1995).

5. On remand, a jury found petitioner guilty on all six counts charged in the indictment. At sentencing, the district court found that, for purposes of setting petitioner's offense level under the Sentencing Guidelines, the loss caused by petitioner's offenses amounted to $400,000. On appeal from that conviction, petitioner again asserted that the Double Jeopardy Clause barred his prosecution on the indictment because of his prior civil settlement with OTS. He argued that the court of appeals should reconsider its prior ruling in light of the district court's finding of loss under the Sentencing Guidelines. In petitioner's view, the district court's loss finding showed that the $1.8 million civil settlement was disproportionate to the loss caused by his conduct and thus constituted punishment under the Double Jeopardy Clause as interpreted in *Halper*.

The court of appeals rejected that contention, finding that "[t]he OTS settlement requiring [petitioner] to pay $1.8 million was based on OTS figures estimating a total loss of $2.275 million." Pet. App. 13A. It held that the district court's sentencing findings

did not require a different result, because the district court's "finding of loss attributable under the sentencing guidelines does not purport to calculate the total amount of loss to the government caused by the defendant's conduct. It is limited to calculation of defined categories of loss caused by charged and 'relevant' conduct." *Ibid.* Here, the court of appeals concluded, the district court's loss calculation "did not include several elements that were considered by OTS in its determination of loss," including losses that occurred before the effective date of the Guidelines and "loss attributable to cost of investigation and enforcement." *Id.* at 13A-14A. The court accordingly held that petitioner had "failed to demonstrate that the OTS settlement was disproportionate and therefore punitive, rather than remedial." *Id.* at 14A.

ARGUMENT

Petitioner renews his contention (Pet. 19-30) that his criminal prosecution and punishment violated the Double Jeopardy Clause. He bases that claim on the theory that he suffered punishment within the meaning of the Clause's protection against multiple punishments when he earlier agreed to pay $1.5 million to the OTS as "a personal obligation." The court of appeals correctly rejected that argument.

1. This Court has construed the Double Jeopardy Clause to protect against both "successive punishments and * * * successive prosecutions." *United States* v. *Dixon*, 509 U.S. 688, 696 (1993). Although Congress ordinarily "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Clause, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), this Court in *United States* v. *Halper*, 490 U.S. 435 (1989), "an-

nounce[d] * * * a rule for the rare case * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. In such a case, *Halper* held that, "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." *Id.* at 449-450. If the civil penalty "does not remotely approximate the Government's damages and actual costs," then, according to *Halper*, it constitutes punishment for double jeopardy purposes and must be reduced to a remedial level. *Id.* at 446, 452.

In *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the Court made clear that *Halper* does not prevent the government from both prosecuting someone for an offense and requiring him, pursuant to civil proceedings, to give up the proceeds of his offense. The Court specifically noted in *Ursery* that a civil provision requiring forfeiture of proceeds of illegal drug activity "serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts," *id.* at 2148-2149, and therefore does not constitute punishment under the Double Jeopardy Clause. Likewise, the courts of appeals that have addressed the issue have unanimously concluded that civil remedies such as restitution and disgorgement are not punishment within the meaning of the Clause because they serve the nonpunitive purpose of preventing offenders from profiting by their illegal acts. See

United States v. *Gartner*, 93 F.3d 633, 635 (9th Cir.), cert. denied, 117 S. Ct. 624 (1996); *Smith* v. *United States*, 76 F.3d 879, 882 (7th Cir. 1996); *United States* v. *Fields*, 72 F.3d 1200, 1209 (5th Cir.), cert. denied, 117 S. Ct. 48 (1996); *United States* v. *Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995), cert. denied, 116 S. Ct. 934 (1996); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994). At a minimum, therefore, when the government imposes a civil restitution or disgorgement remedy that is not grossly disproportionate to the amount by which the defendant has profited or the damage that he has caused, it does not punish that defendant within the meaning of the Double Jeopardy Clause.

A straightforward application of these principles demonstrates that the court of appeals correctly concluded that petitioner was not punished when he agreed to pay restitution to OTS. In response to petitioner's pretrial motion to dismiss on double jeopardy grounds, the district court found that petitioner's conduct had caused Charter Federal to suffer losses of more than $2 million, for which the government became responsible when it seized the thrift. Pet. App. 38A. The consent judgment to which petitioner agreed required petitioner to pay, under the rubric of "Restitution," $1.8 million, which is considerably less than the damage that petitioner caused. See *Halper*, 490 U.S. at 449-450. The assessment imposed on petitioner was not "overwhelmingly disproportionate to the damages he has caused" (*ibid.*) and therefore did not constitute punishment within the meaning of *Halper*.

It is irrelevant that the settlement documents referred to $1.5 million of that amount separately from the $300,000 specifically dedicated "to correct the

conditions alleged to have resulted" from petitioner's offense because, as the court of appeals observed, the documents "consistently refer to both of the payments imposed as 'restitution.'" Pet. App. 67A-68A. Moreover, the total settlement was plainly reached "as a compromise of the amount the bank lost," and "[n]o other basis for the compromise is set forth in the settlement documents." *Id.* at 68A. The entire $1.8 million was properly treated, therefore, as restitution and nonpunitive.

Petitioner contends (Pet. 23-30), however, that the $1.8 million in restitution that he agreed to pay constituted punishment because the district court found at sentencing that the quantity of loss that should be used to set petitioner's offense level under the Sentencing Guidelines was $400,000. That fact-bound contention provides no basis for this Court's review. As the court of appeals concluded, the district court's loss calculation did not include all of the loss caused by petitioner's conduct. For example, the district court did not include losses from the Summer Street scheme because the conduct that caused those losses occurred before the effective date of the Sentencing Guidelines. Pet. App. 13A-14A. There is therefore no basis for further review of petitioner's Double Jeopardy claim.

2. There is no need to hold this case for the disposition of *Hudson* v. *United States*, No. 96-976 (argued Oct. 8, 1997). In that case, among the issues before the Court are whether a civil money penalty assessed pursuant to a broad regulatory scheme can ever constitute punishment within the meaning of *Halper*, and if so, whether such a penalty is punishment if it is in an amount rationally related to the government's costs of investigation and enforcement.

Here, however, the courts below have concluded that the monetary assessment against petitioner was not a civil money penalty, but rather constituted restitution for the losses caused by petitioner's conduct as an officer of Charter Federal. See Pet. App. 68A. Although the court of appeals alluded to the finding that the district court's Sentencing Guidelines loss calculation did not include the government's costs of investigation and enforcement, the court primarily relied on the fact that "[t]he OTS settlement requiring [petitioner] to pay $1.8 million was based on OTS figures estimating a total loss of $2.275 million." *Id.* at 13A. This case therefore does not present the question at issue in *Hudson*, and a decision in favor of petitioners in that case would not assist petitioner here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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